IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

AUG 5 1968

KAREN JEAN HYMER, )
)
Appellant, )
)
vs. )
)
BENJAMIN K. CHAI and )
VICTORIA LEILANI CHAI, )
)
Appellees. )
)

UPON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF HAWAII

CIVIL NO. 22081

# ANSWERING BRIEF

FILED

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## JURISDICTION

This is an action for damages for personal injuries brought by the plaintiffs Benjamin K. Chai and Victoria Leilani Chai, citizens of the State of Hawaii, against defendant-appellant Karen Jean Hymer, a citizen of the State of Nebraska.

The United States District Court for the District of Hawaii had jurisdiction under the provisions of Title 28 United States Code, Section 1332.

The United States Court of Appeals for the Ninth Circuit has jurisdiction under Title 28 United States Code, Section 1291.

Jurisdiction in the Court below as to the claim of plaintiff Victoria Leilani Chai is contested by appellant.

## STATEMENT OF THE CASE

On September 20, 1965, an accident occured at the intersection of Kamehameha Highway and Lipoa Street in the City and County of Honolulu, State of Hawaii, between a motorcycle, driven by the plaintiff Benjamin Chai, and an automobile driven by the defendant. Plaintiff Benjamin Chai

was headed toward Honolulu (in an easterly direction). Defendant was turning left across Kamehameha Highway into Lipoa Street across plaintiff's path of travel.

Plaintiffs filed a complaint alleging negligence on the part of the defendant claiming general damages for Benjamin Chai in the amount of $75,000 and such special damages as would be proved at trial and general damages for loss of society and companionship for plaintiff Victoria Chai in the amount of $7,500 (R. 3-4).

Defendant filed a counterclaim in the amount of $453.12 for property damages and answered the complaint denying negligence and alleging assumption of risk and contributory negligence.

A jury verdict was returned for the plaintiffs on February 27, 1967 (Tr. 593) after a trial before Judge Martin Pence which lasted more than a week. The judgment was in the amount of $48,000 for Benjamin Chai and in the amount of $5,000 for Victoria Chai. The defendant filed a motion for new trial and Plaintiff filed a motion to amend their complaint. Both motions were heard by the Court below and were denied on April 5, 1967. A notice of appeal was filed on May 2, 1967.

At the intersection of Kamehameha Highway and Lipoa Street, Kamehameha Highway consists of three lanes

for travel in the Honolulu (easterly) direction. The lane nearest the curb in which the accident occurred was approximately 1/10 of a mile long on either side of the intersection (Tr. 66). The defendant had been traveling in an Ewa (westerly) direction on Kamehameha Highway prior to making her left turn across the Honolulu bound lanes.

It was during the morning rush hour and traffic was heavy. Cars in the first two lanes of traffic stopped to allow defendant to turn in front of them. Not seeing any vehicles approaching in the third lane, defendant continued on across the intersection. Unfortunately, unseen by defendant, plaintiff was traveling in the third lane in a Honolulu direction. The plaintiff's motorcycle struck the right fender and side of the defendant's car as it proceeded across the third lane of the highway.

The speed limit in this area was 35MPH (Tr. 86). Plaintiff admitted he was traveling 32 MPH at some time just prior to entering the intersection. (Tr. 182).

The motorcycle driven by the plaintiff was damaged beyond possible repair and the front was demolished. (Tr. 224) The right side of defendant's car, right fender, hood and windshield were damaged. Plaintiff was seriously injured.

## SUMMARY OF ARGUMENT

1. The trial court did not err in allowing the loss of consortium claim of Victoria L. Chai to proceed to judgment.

2. There was no prejudicial error in excluding evidence offered to show the plaintiff's prior manner of driving, as that evidence was too remote to be relevant.

3. The trial court did not err in excluding from evidence a certain portion of plaintiff's deposition in that that portion was vague and ambiguous and was not considered as plaintiff's testimony at trial and would only have served to confuse the jury.

4. Trial court did not err in denying defendant's motion for new trial as any communications between bailiff and members of the jury were not improper nor did they materially effect the jury deliberation.

5. The jury's verdict was supported by the evidence in the case and it was not err to deny defendant's motion for a trial for this reason.

6. Plaintiff's counsel's question to defendant concerning criminal conviction for a traffic violation was a proper question. If any impropriety did exist the trial court corrected it by proper instruction and did not err in denying the defendant's motion for mistrial.

7. The final argument of defendant's counsel was not improper and there was no error by the trial court in the control of that final argument.

8. The trial court did not err in refusing the defendant's requested instruction on the Hawaii Law of Exercise of Right-of-Way.

## ARGUMENT

### 1. The Trial Court did not err in allowing plaintiff Victoria Chai's claim for loss of consortium to proceed to judgment. The Court had jurisdiction to entertain the claim and it is a valid cause of action.

Plaintiff Victoria Chai prayed for $7,500.00 in the complaint for loss of consortium, and the jury returned a verdict of $5,000.00 for her on that claim.

Although raising the jurisdictional question in her answer, defendant never once during the course of the trial or even during the hearing on the motion for a new trial raised the question of lack of jurisdiction. The trial judge first brought up the matter on his own motion during the hearing on the motion for new trial (Tr. 24) adden.

Defendant has chosen to bring this point on appeal to this court rather than seeking a decision from the trial court, probably as a result of the cases cited to both counsel by that court at our last hearing indicating rather strongly the inclination of the trial court. These included: (See Tr. p. 55-56) addendum.

Wilson v. American Chain & Cable Co.
364 F.2d 558 (3d Cir. 1966)

Morris v. Gimbel Brothers
246 F.Supp 984 (E.D. Pa. 1965)

Borror v. Sharon Steel Co.
327 F.2d 165 (3d Cir. 1964)

Raybould v. Mancini Fattore Co.
186 F.Supp 235 (E.D. Mich. 1960)

Yuba Consolidated Gold Fields v. Kilkeary
206 F.2d 884 (9th Cir. 1953)

Plaintiff Victoria Chai contends that her claim for loss of consortium is one of "pendent jurisdiction"

ancillary to the claim of her husband Benjamin Chai and that the common sense doctrine of pendent jurisdiction set out in the above cases applies to avoid piecemeal litigation due to limited federal jurisdiction.

In Morris v. Gimbel Brothers, Inc., (E.D. Pa. 1965) 246 F. Supp. 984, the wife brought action to recover $100,000 for personal injury. In the same action the husband sought $50,000 for loss of consortium. The defendant moved to dismiss the husband's claim for lack of the jurisdictional amount. The court held that as a legal certainty the husband could not recover in excess of $10,000. Nevertheless, the defendant's motion was denied. The court said,

> . . . .In the Borror Case, however, the court had before it claims under both the Survivors act and the Wrongful Death Act of Pennsylvania and held that the federal court had jurisdiction of either claim as pendent to the other. The court pointed out that in Pennsylvania the two actions would have been consolidated, that they were for the same tort, for the same injuries and that the damages recovered in one suit were complementary to those recoverable in the other. It might be urged that the present case is distinguishable from Borror on the ground that the parties plaintiff in the two causes of action are separate and distinct. However, in the Borror case, although the nominal party of record was the same in both causes of action, the

> actual parties in interest, namely, the wife on the one hand and the estate on the other, are just as distinct as the husband and wife in the present case. Judge Biggs in the Borror opinion recognized that that decision was an extension of Hurn v. Oursler, supra, in that the former case involved federal and non-federal causes of action whereas the Borror case, like the present one, is a diversity case in which federal jurisdiction turns upon citizenship and the amount involved. However, I think that the observation of Judge Biggs in the Borror opinion, to the effect that the extension of Hurn v. Oursler is a desirable one and should be countenanced by law, is equally applicable to the present case. He said, 'Such a concept seems clearly within the contemplation of Pennsylvania practice. Such a course saves the time of jurors, of witnesses, of the parties, and of the judges, and prevents tortfeasors from being mulcted of damages.' (p. 986)

In Wilson v. American Chain & Cable Company (3d Cir. 1966) 364 F.2d 558, a minor child sought recovery for personal injury in excess of the jurisdictional minimum. The child's father sought recovery for consequential damages to him. The trial court dismissed the father's claim for lack of the jurisdictional minimum. The appellate court reversed the dismissal. The court said that under Pennsylvania law the two claims would be dealt with in one action, and it said,

> In these circumstances it seems to us both appropriate and right to apply the doctrine of pendent jurisdiction, by which a

> claim cognizable in the federal courts may be permitted to carry with it a related claim otherwise not within the federal jurisdiction, if both claims ordinarily would be tried in one judicial proceeding. The basis for this doctrine is the judicial economy, and the conveniences and fairness to litigants which it serves . . . . (p. 564)

The attention of the court is directed to the footnotes in Wilson v. American Chain & Cable Co., supra, at page 564 where the Third Circuit utilized the theory of the decision of this court in Yuba Consolidated Gold Fields v. Kilkeary, supra, to support the pendent jurisdiction doctrine and distinguished this court's decision in Kataoka v. May Dep't. Store Co., 115 F.2d 521 (9th Cir. 1940) as not having considered the application of pendent jurisdiction.

In Hawaii, the law encourages wrongful death and survival actions to be brought in one and the same action. Section 246-2 of the Revised Laws of Hawaii, 1955, provide,

> . . . .If an action is brought pursuant to this section (wrongful death) and a separate action is brought pursuant to section 246-6 (survival), such actions may be consolidated for trial on the motion of any interested party. . . .

It is also very clear that the policy of Hawaii is to expedite in one lawsuit the claim of one party for

personal injuries and the claim of the spouse for loss of consortium, E.g., see Halberg v. Sai K. Young, 41 Haw. 634 (1957). In this regard, Hawaii has adopted the contents of Rule 20 (a) of the Federal Rules of Civil Procedure. Rule 20 (a) of the Hawaii Rules of Civil Procedure provides:

> All persons may join in one action as plaintiffs if they assert any right to relief . . .severally, . . .in respect of or arising out of the same transaction, occurrence. . .and if any question of law or fact common to all of them will arise in the action. . .A plaintiff. . .need not be interested in obtaining. . .all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights of relief.

Plaintiff Victoria Chai therefore asks this court to adopt the theory of pendent jurisdiction in this case and sustain the judgment below.

In Hawaii there is no statute or State Supreme Court decision dealing directly with loss of consortium or loss of a spouse's services, comfort or society.

However, it has been a regular practice in the trial courts of the state for a husband to claim loss of consortium where his wife is injured, and such a cause of action can be considered a part of the common law of Hawaii.

For example, in Chester Lim and Edith Nodi Lim v. Honolulu Rapid Transit Company and Greg C. Len Wai, Civil No. 11635, First Circuit Court, State of Hawaii (1964) the wife was injured in an accident with defendant's bus and husband Chester Lim prayed for damages for himself due to loss of consortium. He recovered $3,000 in a jury verdict for that loss, while the wife obtained a verdict of $34,500 for her injuries.

See also Ada Morneau and Lionel Morneau, et al v. Kaiser Foundation Hospital, et al, Civil No. 7156, First Circuit Court, appealed for different purposes in 48 Hawaii 534 (1965); and Rosalie and Rex Blackburn v. Honolulu Gas Co., Ltd., et al, Civil No. 11257, First Circuit Court (1965); and Robert and Grace Rapoza v. Frank Kazusa, et al, Civil No. 8296, First Circuit Court (1963).

The Constitution of the State of Hawaii which became effective on August 21, 1959, provides in part:

> Section 4. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. (emphasis added).

Since the effective date of this provision claims have been filed and disposed of in the trial

courts of the state for loss by a wife of husband's consortium when husband has been injured due to another's negligence. See Gerald S. and Arlene K. Kamoe v. Hawaiian Raceway Park, Ltd., Civil No. 17,563, First Circuit Court, State of Hawaii where the wife's claim for loss of consortium was not contested and the case was settled prior to trial.

Two cases directly in point hold that it is a denial of equal protection to deny the wife the right to sue for loss of consortium while permitting such suit by husband:

Owen v. Illinois Baking Corp. 260 F.Supp. 820 (W.D. Mich 1966)

Karczewski v. Baltimore and Ohio R.R. Co., 274 F. Supp 169 (N.D. Ill. 1967)

It is submitted that loss of consortium is a cause of action which is part of the law of Hawaii, and that it would be discriminatory and a violation of Article 3 of the Hawaii Constitution, above, if the cause of action were not available to both husband and wife for respective loss of the other's services.

Therefore, it was not error for the trial court here to allow Victoria Chai's claim to be tried and a verdict returned on that claim by the jury.

### 2. The Trial Court properly excluded evidence offered to show plaintiff's prior manner of driving.

At three different times during the trial defendant's counsel attempted to show by different witnesses that plaintiff had, while traveling along Kamehameha Highway that morning at a point distant from the accident location, cut between two cars in the line of travel. One of the cars that he cut between was a police car driven by witness police officer Ronald Wong (Tr. 399-403). The act was witnessed by the witness Everett Lawrence (Tr. 123-126) and plaintiff Benjamin Chai was questioned concerning the act on cross examination (Tr. 233-235).

This act was a violation of a traffic ordinance (Tr. 124) and would have shown an act of possible negligence on the part of plaintiff remote from the scene of the accident and irrelevant to the case at hand.

In each instance the trial court properly sustained an objection by plaintiff's counsel to the proffered testimony.

The test for the admissability of such evidence is thoroughly developed in the annotation Admissability, in action involving motor vehicle, of evidence as to manner in which participant was driving before reaching scene of accident. 46 ALR 2d 9 (1956), and is stated succintly therein at page 13 as follows:

> "In determining the admissability of evidence concerning the manner in which a participant to an accident was driving a vehicle before he reached the scene of the accident, as against the objection that the testimony is remote, the most important factor is the degree of probability that the conduct continued until the accident occurred . . . ."

See also pages 13-18 of the same annotation.

The evidence is uncontroverted in this case that Benjamin Chai was in one lane of travel for approximately 1/10 of a mile before the accident occurred and did not cut back and forth in that time.

Further, defendant's counsel admitted that Chai was not speeding at the distant point when he cut between the cars (Tr. 403) but only presumed from the act of cutting between cars that Chai was "hurrying."

> ". . . the question of remoteness depends to a great degree upon the facts of the particular case. (citations)

> And the question whether the testimony as to the manner of driving before reaching the scene of the accident is admissible or should be excluded on the ground of remoteness rests in the discretion of the trial court."
> 46 A.L.R.2d 9 at p. 20.

The trial court properly decided in this case that the act to be testified to occurred at a point too distant from the accident scene to be relevant and that the act itself was too remote from the facts of the accident to be material.

3. The trial court correctly excluded certain portions of plaintiff's deposition as being vague, ambiguous and unintelligible.

Defendant offered as evidence that portion of plaintiff Benjamin Chai's deposition from page 17, line 4 to page 38, line 19 pursuant to Rule 26(d) (2) of the Federal Rules of Civil Procedure. (Tr. 426)

Defendant contends the court erred in refusing to allow page 31, lines 1-19 and page 32, lines 3-7 of Chai's deposition to be admitted (Tr. 432-434). The court excluded these questions and answers because they were unintelligible and would be confusing to the jury (Tr. 433).

Plaintiff's Exhibit 1, a sketch of the intersection, was used throughout the trial for reference and testimony of various witnesses. Plaintiff Benjamin Chai testified at great length from Exhibit 1 and made certain statements referring to that diagram regarding his ability to see certain portions of the intersection (Tr. 283, 285).

Defendant's Exhibit E is a rough sketch of the intersection drawn by Chai at his deposition and was in front of him while the testimony on deposition, pages 31 and 32, was taken (Tr. 302).

Defense counsel attempted to impeach plaintiff Chai without correlating the areas referred to on the two exhibits or in the two proceedings (Tr. 291). Extreme confusion resulted (Tr. 291-294). Defense counsel's later attempt to correlate the two never was successful (Tr. 302-315).

Plaintiff testified again and again during the trial that as he approached the intersection he could not see into Lane #1 (see Exhibit 1), but could see into lanes #2 and #3 (Tr. 283 and 315).

The excluded portion of the deposition on page 31 includes Chai's statement that he could not see into

the outside lane. Both court and counsel agreed that Lane 1 and the outside lane were the same (Tr. 317). When the trial judge finally worked through the maze created by the wording of questions and answers on page 31 of the deposition and Chai's testimony at trial (Tr. 316-317), he concluded that there was no impeachment and therefore page 31 was repetitious.

In Pursche v. Atlas Scraper and Engineering Co., 300 F.2d 467 (9th Cir. 1962) this court said:

> We do not mean to sanction the practice of indiscriminately offering an entire deposition or encourage any attempt to thus impose upon the court. In Merchant's Motor Freight v. Downing (227 F.2d 247 (8th Cir. 1955)) the court stated that the deposition of a party might be admitted "subject to the court's right to exclude such parts thereof as might be unnecessarily repetitious in relation to the witness' testimony on the stand.

It is obvious from discussions between court and counsel (Tr. 316-322) regarding deposition, p. 31, that, taken in context with the testimony at trial, these questions and answers were ambiguous, difficult to understand, and would have confused the jury.

Referring specifically to the portion of page 33 ruled inadmissible, the court found that there was no positive means to determine the specific location

referred to in that question (Tr. 433). The question and answer read:

> Q. And you indicated that when you were in the third lane at the speed you were moving, you couldn't see this portion of the intersection. Is that true?
>
> A. Because I'm looking ahead. I have to visualize all, and it's a pretty wide intersection there.

The question is unintelligible as nothing specifically defines the words this portion.

The answer to the question is just as bad as it is impossible to determine if Chai means Yes or No.

2A Barron and Holtzoff, Federal Practice and Procedure, §654 at p. 171

> When all other conditions exist which authorize the use of a deposition at a trial or hearing, it must still be determined whether the testimony is admissible in evidence. Rule 26(d) authorizes use of the deposition "so far as admissible under the rules of evidence." Rule 26(e) permits objections to be made at the trial or hearing for any reason which would require the exclusion of the evidence if the witness were present and testifying.

4. No improper communications between the Bailiff and members of the jury were shown by defendant.

While the jury was deliberating in the case, the judge, both counsel for plaintiff and for defendant, and the bailiff were in the judge's chambers at about

10:00 p.m. February 27, 1967. (Tr. Addendum, p. 17). At this time the bailiff recited to all present certain conversations that he had had with the members of the jury while they were out for dinner (Tr. Addendum, pp. 4-18). No one present at the time considered the conversations improper or out of line, no comment was made except in a jovial conversational manner, and certainly, defense counsel made no attempt to correct any impropriety by additional instruction to the jury or by motion for mistrial at that time. Defense counsel first raised this point at the hearing on motion for new trial on March 31, 1967 (Tr. Addendum, p. 2).

At that hearing, the bailiff, Josef D. Cooper, was placed on the stand and questioned carefully by defense counsel (Tr. Addendum, pp. 6-17). The bailiff testified to several specific questions from jurors and his answers. The first was a juror named Humphrey who asked him what would happen if the jury were unable to reach a verdict? Cooper responded that if there were no decision, it would be up to the parties to decide what they would do up to that point (Tr. Addendum, p. 8).

Humphrey also asked him who paid the cost of the litigation, meaning the cost of the court's staff

and other costs incurred by the parties. Cooper responded that there were no costs which resulted in the presence of the judge, use of the courtroom, use of the staff and any other costs would be incurred by the parties themselves (Tr. Addendum, p. 9).

Humphrey also asked Cooper what would happen if one of the parties to the litigation were an insurance company, and Cooper responded that they would be treated the same way as any other (Tr. Addendum, p. 9).

There were inquiries to Cooper as to who appointed Judge Pence, and he replied that he was appointed by the President of the United States or the governor of the state (Tr. Addendu, p. 10).

There were inquiries made as to Judge Pence's personal history, was he a resident, a native of the State of Hawaii, to which he responded that he had been in Hawaii for approximately 30 years (Tr. Addendum, p. 10).

There was also an inquiry as to where Mr. Hart (another clerk) was on that day to which Cooper responded that he was unable to be in court. There were also questions as to the function served by the people who sit before the judge, namely, the clerk and the bailiff, and

Cooper explained those functions generally (Tr. Addendum, p. 10). There were other general questions concerning the law (Tr. Addendum, p. 11).

However, Cooper testified specifically that there was no reference to Chai v. Hymer, and no reference as to whether, in fact, there was an insurance company involved in that particular case (Tr. Addendum, p. 12).

Upon the completion of this testimony during the hearing on the motion, Judge Martin Pence, who was presiding and who had been present in his chambers when the conversation first occurred, stated as follows:

> THE COURT: Well, I am prepared to rule that while not divorcing, I find that there is no great significance at that date, nor did I find it in my chambers; and as to the numbness, I don't state that I was numb at the time, and I wasn't shocked by the revalations of the bailiff at the moment, and I am not shocked now.
>
> I do not feel that the conversation recited by the bailiff at that time, nor do I find that the conversation as related by Mr. Cooper here on the stand, in any way would have or did have or could have had any relevance to the case then before the jury. (Tr. Addendum, p. 22)

Before the bailiff took the jury to dinner, Judge Pence had specifically allowed conversation between bailiff and jurors at dinner, provided of course that the

conversation had nothing to do with the merits of the litigation (Tr. Addendum, pp. 7-8).

89 C.J.S., Trial, §457f., page 86

> Contacts between court officers and jurors, except as authorized by the court in appropriate circumstances, are not to be countenanced. . . Although. . . it is not misconduct if the conversation is on subjects which are unrelated to the case.

Plaintiffs submit that under the circumstances, there was absolutely no factual basis for any court or counsel to believe that the conversation between bailiff and the juror herein was improper or affected the trial of this case in any way. In any event, defense counsel waived any right to now complain as he knew of the conversations before the verdict was returned.

5. The jury's verdict was supported by the evidence and the trial court did not err in refusing to grant the motion for a new trial.

Defendant contends plaintiff was guilty of contributory negligence as a matter of law.

The evidence upon which the defendant bases this premise is:

1. Plaintiff admits to traveling at 32 mph as he entered the intersection (Tr. 257).

2. Traffic conditions were heavy and stop and go (Tr. 26).

3. Plaintiff could not see into the intersection while traveling at a high rate of speed.

4. Plaintiff did not notice that traffic had come to a complete stop.

5. Plaintiff's speed directly contributed to the extent of his injuries.

Further facts which must be taken into consideration are as follows:

1. Speed limit for plaintiff was 35 mph.

2. Plaintiff testified that the lane he was traveling in was free of vehicles, that he had a clear view of that lane (Tr. 336), and he could see into the adjacent lane at the intersection.

3. Plaintiff testified that the traffic in the adjoining lane at the intersection came to a stop just as he arrived at the intersection(Tr. 299).

4. There was no conclusive evidence in the case that plaintiff's speed, considering the traffic and the conditions at the intersection, was unreasonable under the circumstances.

Plaintiff admits that under certain circumstances one can be contributorily negligent as a matter of law, Ferrage v. Honolulu Rapid Transit, 24 Hawaii 87 (1917), but courts have been extremely careful in adopting this principle. For example, see the case cited in defendant's brief at page 45, Young v. Price, 47 Hawaii 309, 388 P.2d 203 (1963). The Supreme Court of the State of Hawaii initially decided that plaintiff was guilty of contributory negligence as a matter of law and then on rehearing, reversed itself. See Young v. Price, 48 Hawaii 22, 395 P.2d 365 (1964) where the court said:

> The basic rule governing the determination of whether there was sufficient evidence to take the contributory negligence issue to the jury is . . . the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and the inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury. p. 24.

The facts presented in this case clearly make the negligence of Benjamin Chai a matter for the determination of the jury under proper instructions.

More than sufficient evidence existed to support

the jury's verdict that defendant was negligent and her negligence was a proximate cause of plaintiff's injuries.

For example, Section 15-8.2(4) of the Traffic Code of the City and County of Honolulu states:

> Vehicles intending to turn left from a divided highway, exit from which is made by means of a left-turn decelerating lane constructed in the medial strip area, shall enter the decelerating lane and shall yield the right of way to approaching vehicles before proceeding with caution across the intersection and into the intersecting roadway. . .

Section 15-11.2 reads:

> The driver of a vehicle within an intersection intending to turn left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection, or so close thereto as to constitute an immediate hazard.

In Hawaii, a failure to observe the requirements of a traffic ordinance is evidence of negligence. Young v. HC&D, 34 Hawaii 426 (1938).

A jury verdict supported by substantial evidence, more than a mere scintilla, will not be disturbed.

Howell v. Associated Hotels Ltd.,
40 Hawaii 492 (1954)

Tradewind Transp. Co. v. Taylor,
267 F.2d 185 (9th Cir. 1959)

From all of the facts contained in the transcript, it would appear that when defendant turned left in front of Chai's path of travel, she did not hear Chai, did not see Chai and did not pause at the third lane to check for oncoming vehicles, and this evidence was more than sufficient to support the jury's verdict. We submit that the trial court did not err in refusing defendant's motion for a new trial.

6. Court did not err in denying defendant's motion for mistrial.

Counsel for defendant confuses two completely different principles of evidence in urging on this court the proposition that there was any error in asking plaintiff if she had been convicted of an offense arising out of this accident.

The two principles involved are:

(a) Admission

(b) Credibility

If the evidentiary theory for admissibility was admission, and knowing that defendant had pleaded "No contest" to the traffic charge, it would have been improper for plaintiffs' counsel to ask what her plea was since that plea is not an admission.

However, Section 222-22, Revised Laws of Hawaii

1955, reads as follows:

> Discrediting witnesses by proof of conviction. A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.

In Hawaii, according to Section 222-22, a witness may be questioned as to whether or not he had been convicted of an offense to test his credibility.

This was precisely the question put to defendant Mrs. Hymer.

The offer of proof made by plaintiffs' counsel to the court below was that "Mrs. Hymer was convicted for such an offense." (Tr. 52). "She went down to the Pearl City Traffic Court, pleaded No Contest, and was found guilty by the judge." (Tr. 52).

The question was asked, as allowed by the statute, to impeach the credibility of the witness by a conviction, not to show an admission by a plea of guilty.

The trial court missed the significance in these two different evidentiary bases (Tr. 53) and sustained plaintiff's objection to the question.

Any prejudice which might have resulted to plaintiff from the wording of the question was more than adequately cured by the court below in its instruction to the jury right at that time:

> The objection to the last question is sustained.
>
> Ladies and gentlemen of the jury, I can tell you that the mere fact that a question is asked regarding a conviction, and so forth, and the objection to that is sustained, that you cannot presume from that that she was convicted or wasn't convicted. The matter of the present status is that the objection is sustained and you will ignore the question and all the implications which might arise in the question itself. (Tr. 51-54)

The ordinary presumption is that a jury will abide by the court's instruction to disregard anything that has been improperly placed before it.

> State v. Cavness,
> 46 Hawaii 470, 381 P.2d 685 (1963)
>
> 53 Am.Jur., Trial,
> §506, p. 408

Plaintiff contends that counsel did not ask an improper question, but if he did, the court cured any impropriety with its quick and specific instruction.

7. Defendant contends that plaintiffs' counsel was improper in portions of his argument to the jury and that the trial court erred in failing to keep plaintiffs' counsel within the boundaries recognized

at law. Defendant cites two specific instances of this impropriety.

The first is that plaintiffs' counsel argued law to the jury in final argument misstating the Hawaii law of right-of-way.

The second is an allegation that plaintiffs' counsel called attention to the failure of defendant to call certain types of expert witnesses when no such experts were called by plaintiffs were shown to exist.

In response to the first so-called impropriety, the court's attention is directed to the transcript addendum, pp. 72-74. Plaintiffs' counsel, during this portion of the argument, was reading certain sections from the Traffic Code of the City and County of Honolulu which were adopted by the court as a portion of its instructions (see Tr., pp. 561-564) and relating them to the facts in evidence.

The specific objection made by defense counsel to this argument is shown on transcript addendum, p. 73 as follows:

> MR. GOULD: If the Court please, I am awfully reluctant to interrupt again but counsel is attempting to testify that Mr. Chai is not susceptible to

> all the ordinances. He said this ordinance as applicable to Mr. Chai --

No objection was made by the defense that there was a misstatement of law and the attention of the court was not called at that time to any possible misstatement of law by plaintiffs' counsel. The defense would now have this court on appeal consider for the first time the factor in final argument which it did not bring to the court's attention at the time of the argument, supposing that in fact such a misstatement was made.

The court properly cautioned the jury in its instruction on p. 73, and the plaintiffs' counsel corrected his statement in his immediate comment to the jury on pp. 73 and 74 of the transcript addendum, where he said:

> "If I for one moment intimated to you that all the Code provisions that the Court is going to read to you are not applicable fully and completely to both parties, then I was in error because they are. . . ."

The second impropriety cited by the defendant is that plaintiffs' counsel argued that the defense did not present an expert in the courtroom who would have given an estimate on speed based on the physical factors which were in evidence regarding the accident, namely, the damage to the automobile and the positions of the vehicles after the accident.

This was proper comment under the circumstances in that defendant had made an issue in the case of plaintiff's speed in an attempt to show contributory negligence of the plaintiff. The only evidence adduced at the time of argument as to plaintiff's speed was plaintiff's statement that he had seen his speedometer soon before the accident and it read 32 mph (Tr., p. 257), the physical facts surrounding the accident and the testimony of the witness Lawrence that he heard a roar of acceleration from plaintiff's motorcycle that continued all the way until the point of impact and that Lawrence estimated the speed to be between 30 and 40 mph (Tr. 153).

Faced with no positive evidence that plaintiff was speeding, defendant insisted upon arguing to the jury that, in fact, plaintiff Chai was speeding (see transcript addendum, pp. 30 and 40).

Since plaintiff had produced positive evidence regarding speed, it was proper in argument to comment that defendant had not. See 53 Am.Jur. 381, Trial, Sec. 475 and 5 A.L.R.2d 893 at p. 895.

### 8. Trial Court did not err in denying Defendant's instruction No. 18.

Defendant's instruction No. 18 reads as follows:

"You are hereby instructed that a right-of-way is not absolute but at all times relative and subject to the fundamental doctrine that a party shall exercise the right so as to avoid any injury to himself and others."

In instructing the jury (Tr. 545-581), the court did give the following instructions. He defined negligence (Tr. 558), ordinary care (Tr. 559), proximate cause (Tr. 565-566), contributory negligence (566). He also gave Section 15-2.17(1) of the Honolulu Traffic Code as an instruction as follows:

> "Right-of-way is the privilege of the immediate priority -- the privilege understand -- the privilege of immediate priority of use of the road." (Tr. 561) (the emphasis was added by the court.)

And at page 564 the court again instructed on right-of-way as follows:

> "We have to go back to the right-of-way again. What is the right-of-way? A right of way is a privilege. It doesn't say it is a right. It is a privilege, immediate priority of the use of the roadway." (Tr. 564).

He further instructed the jury as follows:

> "Now, you are instructed, as I read it to you, that the Traffic Code of the City and County of Honolulu prescribes therein certain duties for the protection and safety of others. Nevertheless, a violation of the Traffic Code is not absolutely and of itself conclusive as to the liability of the violator. However, if you find a reasonable and logical connection between a failure to observe the requirements of this Code and an injury which is claimed to have been caused by that failure, then the negligence of the duty imposed by the Code is evidence of negligence, evidence of negligence to be considered by you together with all the other evidence in the case. (Tr. 594-595).

Defendant took Instruction No. 18 from Mossman v. Sherman 34 Hawaii 477 at page 481 which reads as follows:

> "It is true according to the defendant's testimony that he reached the intersection of the two streets ahead of the other colliding car. Under section 66 of the traffic code which provides that 'the operator of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection' the defendant had the right of way. It by no means follows, however, that this right of precedence is absolute and can be exercised with impunity under all circumstances regardless of the safety of others, to whom the operator of the vehicle owes the duty of reasonable care.
>
> In the recent case of McCombs v. Ellsberry, 337 Mo. 491, 85 S.W. (2d) 135, the supreme court of Missouri expressed this view in the following language: 'The mere fact that the operator of a motor vehicle

> reaches and enters an intersection prior to the entry of another automobile therein does not in and of itself give such operator the right to proceed across the intersection in any event; and where it becomes an issue of fact for a jury to determine whether or not in approaching or proceeding across an intersecting highway the operator of the motor vehicle first reaching or entering upon the intersection, in the exercise of due care, might have avoided a collision and resultant injuries, and instruction to the effect that irrespective of the existing conditions such operator has a right to proceed across the intersection is erroneous.'"

It is obvious from the above language that Mossman v. Sherman stands for the proposition that it is error to instruct that an operator with the right-of-way has an absolute right to proceed across an intersection.

Judge Pence made it very clear in the instructions given that any right of way in this case was a privilege and not a right and further gave sufficient general instructions on negligence, proximate cause and contributory negligence to completely cover the concept that an ordinance giving either party the right of way does not in and of itself give that party a right to proceed in any event as advanced in both Mossman v. Sherman and McCombs v. Ellsberry.

In determining whether a court errs in denying an instruction, the instructions given to the jury must be considered as a whole. <u>Cozine v. Hawaiian Catamaran Ltd</u>. 49 Hawaii 77 (1966).

It is not error to deny an instruction adequately covered by those given.

Taking all of the instructions given in this case as a whole, the concept of right of way of <u>Mossman v. Sherman</u>, <u>Supra</u>, was thoroughly covered and no error resulted from a failure to give Instruction No. 18.

## CONCLUSION

The case of both Plaintiffs and Defendant was fairly presented to the jury which was thoroughly and correctly instructed on the applicable law by Judge Martin Pence, and which after a long deliberation returned a verdict for the Plaintiffs.

The trial court did not err in any of the instances set out above for the reasons stated in this brief.

The court below had jurisdiction of both claims through the exercise of the doctrine of pendant

jurisdiction.

The Plaintiffs therefore ask this court to affirm the judgment entered below.

DATED: Honolulu, Hawaii, July 29, 1968.

Respectfully submitted,

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# CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DENNIS E. W. O'CONNOR